Supreme Court, U.S.
FILED
NOV 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-397

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

CHURCH OF ST. PAUL AND ST. ANDREW,
Petitioner,

v.

KENT L. BARWICK, *et al.*,
Respondents.

REPLY BRIEF FOR PETITIONER

WILLIAM BENTLEY BALL
Counsel of Record

PHILIP J. MURREN
SANDRA E. WISE
BALL & SKELLY
511 North Second Street
P.O. Box 1108
Harrisburg, PA 17108
(717) 232-8731

FRANK PATTON, JR.
WILLIAM LEIBOVITZ
ELLIS, STRINGFELLOW, PATTON
& LEIBOVITZ
51 East 42nd Street
New York, NY 10017
(212) 867-0180
Counsel for Petitioner

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SUMMARY OF REPLY	1
REPLY	2
CONCLUSION	9

TABLE OF AUTHORITIES

Cases: Page

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 8

Colautti v. Franklin, 439 U.S. 379 (1979)..... 8

CSC v. Letter Carriers, 413 U.S. 548 (1973)..... 2

Epperson v. Arkansas, 393 U.S. 97 (1968) 8

Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952) 9

Lutheran Church In America v. City of New York, 35 N.Y.2d 121 (1974) 6, 7

Pierce v. Society of Sisters, 268 U.S. 510 (1925) .. 8

Society for Ethical Culture v. Spatt, 51 N.Y.2d 449, 415 N.E.2d 922 (1980) 6

Trustees of Sailors' Snug Harbor v. Platt, 29 A.D.2d 376, 288 N.Y.S.2d 314 (N.Y. App. Div. 1968). 6

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. ____, 105 S.Ct. 3108 (1985)..... 8

Wooley v. Maynard, 430 U.S. 705 (1977) 8

1025 Fifth Avenue, Inc. v. Marymount School of New York, 475 N.Y.S.2d 182, 123 Misc. 2d 756 (N.Y.Sup. Ct. 1983) 6

Constitutional Provisions:

United States Constitution, Amendment I..... *passim*

Statutes:

New York City Administrative Code:

§207-5.0 4

§207-6.0 4

§207-8.0 5

TABLE OF AUTHORITIES—*(Continued)*

	Page
§207-9.0	4
16 U.S.C. §462(d)	3
16 U.S.C. §470a(a)(6)	3
Other Authorities:	
Berger, *Church Seeks To End Status As Landmark*, N.Y. Times, Sept. 3, 1986, at B1, col. 5	5
THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH (1976)	7

No. 86-397

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

CHURCH OF ST. PAUL AND ST. ANDREW,
Petitioner,

v.

KENT L. BARWICK, *et al.*,
Respondents.

REPLY BRIEF FOR PETITIONER

SUMMARY OF REPLY

Contrary to the contentions of respondents, the constitutional questions raised by the Church are unavoidable. The Church's position from the outset has been that the nonconsensual landmarking of an active house of worship is itself unconstitutional (96a). Hence the case was ripe from the moment of landmarking the Church of St. Paul and St. Andrew. An enforced resort to the "ameliorative remedies" described by respondents and the Court of Appeals presumes the underlying constitutional validity of this landmarking. Hence all the "remedies" are irrelevant to the issue of ripeness.

REPLY

The Church addresses the following arguments first raised in the Brief In Opposition (hereinafter, "Br."):

1. That the Church challenges the facial constitutionality of the Landmarks Preservation Law. Respondents state that the Church attacks the ordinance, not as applied, but on its face, since (so respondents argue) there has not yet been "an application or imminent threat of application of the statute" to the Church. (Br. 19). Respondents also argue that, since landmarking a building is not a "taking", and anyhow does not impinge on the Church's free exercise rights (Br. 20), therefore "mere" landmarking is not an application of the Landmarks Law. Only (so the argument continues) after the Commission would have ruled on a request for a certificate of appropriateness or a statutory hardship application (Br. 21), could the ordinance be said to have been "applied".

The argument is obviously fallacious. Landmark designation is nothing *other* than an application of the Landmarks Law, and the Church's challenge to that designation is not a facial challenge seeking the complete invalidation of the Law as to every possible subject. *CSC v. Letter Carriers*, 413 U.S. 548, 580-581 (1973). Moreover, the argument is circular and proves nothing, it being merely a restatement of the Commission's arguments regarding ripeness.

2. That ameliorative relief was available to the Church and declined by the Church. Respondents' claim of lack of ripeness hangs on a single point: that the Church failed to utilize avenues of relief available to it before taking respondents to court. The lengthy and detailed descriptions of these avenues in the Brief In

Opposition — laced with pledges of administrative liberality[1] — are utterly irrelevant to the one claim here made by the Church: that the Constitution bars the landmarking of its house of worship.

The obstinate flaw of logic in respondents' position is that they will not come to grips with the only issue posed by the Church: landmarking, not ameliorated landmarking. The issue is not the prisoner's right to better prison conditions; it is whether he should be jailed at all. Therefore, from the moment the Church's house of worship was landmarked, the constitutional issue was posed. A question of ripeness could arise only if the Landmarks Law provided an express exemption for objecting houses of worship, and the Church would bring suit before seeking the exemption.

The Landmarks Law, of course, contains no such exemption.[2] And each of the kinds of alleged ameliorative relief set out in the Brief In Opposition is a blind alley which the Church of St. Paul and St. Andrew should not be forced to expend its fast disappearing assets to explore.

---

1. *E.g.*, "a comprehensive scheme of regulatory options" (Br. 11); "short statutory periods permitted the Commission to consider relief applications" (Br. 28); "ample protection" for landmark owners in Certificate of Appropriateness proceedings (Br. 13); "solicitude" of Commission for any potential hardship (Br. 28); the Landmarks Law's "remedial" provisions (*ibid.*); "enormous" potential for development of "creative alternatives to demolition" (Br. 43); Commission denied opportunity to "work with" petitioner (Br. 30-31). Underneath this facade of benignity lies the hard resolution that houses of worship *shall* be landmarked at the will of the Commission and that religious considerations shall not be taken into account in designations. (Br. 4, 10).

2. In this it contrasts with the National Historic Preservation Act which forbids the designation of any privately owned property as a National Historic Landmark over the objection of the property's owner. 16 U.S.C. §470a(a)(6). Nor may the Secretary of the Interior acquire any interest, for historic preservation purposes, in any property owned by any religious institution without the consent of that institution. 16 U.S.C. §462(d).

The blind alleys which respondents describe are five:

a. Permit For Minor Work (§207-9.0). (Br. 11). This obviously has no application here, and the Church wonders why respondents cited it.

b. Certificate of No Effect on Protected Architectural Features (§207-5.0). (Br. 11). This, too, is completely irrelevant, in part, because the Church indeed has proposed to change and affect exterior architectural features.

c. Certificate of Appropriateness (§207-6.0). (Br. 12). Respondents here, as with the Permit For Minor Work and the Certificate of No Effect, point to the short time in which the Commission must act, and they add that the applicant gets a public hearing, and that the Commission has granted approximately 1,500 of these permits (*ibid.*) - all of those recitations being irrelevant.

First, respondents rely upon a 1980 statement of the chairman of the Church's board (Br. 4) as evidencing the Church's intention to leave part of its building standing. Respondents then argue that any constitutional issue in this case was avoidable since, had the Church sought a certificate that the standing portion was appropriate, the Commission might have agreed. The statement in question, however, was made prior to designation and in the course of the Church's resistance to landmarking. (Appellant's App., New York Court of Appeals, A44-A45). It must be viewed as nothing more than a tentative expression that the Church might desire to preserve a very small portion of its sanctuary structure (while demolishing most of the present building). The Church's subsequent and final pre-designation position (which respondents neglect to disclose) was one favoring total demolition.[3] That being so, the Certificate of

---

3. "Our rebuilding goals included . . . the creation of an efficient new church premises on our own site ..." (Gurley affidavit, 106a). "Our Church is eagerly awaiting the moment when we are

Appropriateness procedure was completely irrelevant.

The gist of the Certificate of Appropriateness procedure is a determination of whether any proposed alteration of any building will really, in the judgment of the Commission, cause the already landmarked building to appreciably lose its "special character or special historical or aesthetic interest or value." *Ibid.* But respondents correctly say that "in determining whether to designate a building a landmark, the *only criterion to be considered is the historical and aesthetic value of the structure iself.*" (Br. 4, 10, emphasis supplied). Nothing in the ordinance (and nothing in respondents' brief) gives any ground for the assumption that any other criterion — *e.g.*, religious need — could possibly have been taken into account had the Church of St. Paul and St. Andrew applied for a Certificate of Appropriateness. Therefore the underlying premise of the Appropriateness procedure is that the aesthetic judgment of the Commission must in all cases override religious choice.

d. Statutory Hardship Procedure (§207-8.0). (Br. 13-15). This procedure would have proved but another cul-de-sac for the Church. It would have afforded no

---

free to move forward toward our new building." (Richmond affidavit, 118a). "Plaintiff asserts that, unless it is permitted to demolish the Church, it will be unable to raise sufficient funds to finance its religious and charitable activities." (Affirmation of Assistant Corporation Counsel Rosenberg, Appellant's App., New York Court of Appeals, A35). "[W]e face bankruptcy because of our enormous pending repair costs and because of the high cost of simply trying to maintain the building from day to day. We do not have the funds to renovate our building; even if we had the capital funds for substantial renovation we have no funds to carry the enormous maintenance costs of a renovated building into the future. We have nothing more than a $35,000 endowment left, and any emergency and unavoidable substantial repair bill will wipe us out. . . . In order that the Commission can add us to this 'list' of landmarks, we are to be forced into retaining a *building* that for us is a financial and physical disaster." (George affidavit, 121a, emphasis supplied). *And see*, Berger, *Church Seeks To End Status As Landmark*, N.Y. Times, Sept. 3, 1986, at B1, col. 5.

"ample protection" (Br. 13) whatever to the Church. As respondents recite, the Church, to make use of this avenue, would have had to put its property up for sale or lease. (Br. 14). Respondents thus promptly back away from having, unaccountably, invited the Court to devote its attention to this irrelevant item. (Br. 15). The Court of Appeals itself held this procedure inapplicable. (4a, n. 2).

e. The "Judically Created Hardship" Avenue. Respondents cite *Lutheran Church In America v. City of New York*, 35 N.Y.2d 121 (1974) as authority for an argument that, had the Church but applied to the *Commission* for relief, the *Commission* could have granted it, possibly quite speedily. (Br. 38-40). The Commission cites, as examples of its liberality, a completely undocumented narrative concerning the Episcopal Diocese of Brooklyn (Br. 38-40) and *1025 Fifth Avenue, Inc. v. Marymount School of New York*, 475 N.Y.S.2d 182, 123 Misc. 2d 756 (N.Y.Sup. Ct. 1983). (Br. 40-42).[4] *Lutheran Church* is no authority awarding power to the

---

4. The Commission's reliance upon *1025 Fifth Avenue, Inc. v. Marymount School of New York* is misplaced. *Marymount* involved a challenge by adjacent property owners to a Commission decision that Marymount, a commercial nonprofit institution, could build a gymnasium on nonlandmarked buildings located in an historic district. Marymount had applied to the Commission for a Certificate of Appropriateness to proceed with building the gymnasium. The Commission denied the application, but allowed Marymount to proceed with alterations finding Marymount had shown insufficient return because it could not carry out its purposes without building the gymnasium.

The court in *Marymount* held that the Commission had jurisdiction to apply the "common law" hardship test created in *Trustees of Sailors' Snug Harbor v. Platt*, 29 A.D.2d 376, 288 N.Y.S.2d 314 (N.Y. App. Div. 1968) and *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 415 N.E.2d 922 (1980). This holding, however, has never been approved by the New York Court of Appeals. (4a, n.2). In the present case, the dissent in the Court of Appeals specifically challenges the authority of the Commission to apply a constitutional test reserved to the courts and never written into the statute by the New York legislature. (*See*, 26a-28a).

Commission to evaluate hardship, especially religious hardship. In that case the court simply held the landmark designation of a church's office building to be "nothing short of a naked taking." *Lutheran Church*, 35 N.Y.2d at 131. Respondents attempt to utilize *Lutheran Church* to set up the Commission as a District Board of Church Location and Building[5], with the intrusive power to override, for aesthetic reasons, religious judgments of the Church and to pass upon questions of a most sensitive kind, relating to a religious congregation, stewardship of church finances, the plan of a house of worship, etc. — but without the slightest degree of right, knowledge or competence to weigh and resolve such questions.

3. *That the Church could not legally have suffered a deprivation of due process or free exercise unless there had been an actual "taking" of its house of worship, and there has been no "taking"*. (Br. 25-30). This argument is fallacious in two respects. First, it is obviously untrue to say that a statute could never offend due process or free exercise unless it would be of such a nature as to constitute a "taking", or appropriation of property. Surely an ordinance which would forbid churches to hold services on but one day of the week would not constitute a "taking" but would also presumptively constitute a denial both of due process and free exercise. Here the landmarking of the Church of St. Paul and St. Andrew inflicts worse damage, not only threatening the Church with certain extinction, but at this very moment (as for the past seven years) actively hastening that extinction.

Second, what constitutes a "taking" depends in part upon the nature of the thing taken and (as respondents'

---

5. Which is the organ established by United Methodist Church to pass upon questions pertaining to the best uses of Church property for the Church's religious ends (and hence, necessarily, related issues of hardship). THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH §§2415-2418 (1976).

citation to *Williamson*[6] notes (Br. 26-27)), the degree "at which regulation becomes so onerous that it has the same effect as an appropriation . . . ." The record in the present case abundantly establishes that that point has long since been passed in the application of the Landmarks Law to St. Paul and St. Andrew. The designation, five years ago,, produced a continuing crisis of financial deprivation, the coerced diversion of the congregation's funds to support a public cultural program, and the virtual destruction of the Church's capacity to plan for its survival according to its religious nature. (38a, 103a-105a, 110a, 115a, 121a).

There is no substance to respondents' contention that, because the Church has not yet been the object of prosecutorial action under the ordinance, it is thereby unharmed despite the statutory provision for prosecutorial action should it in any way show noncompliance with the ordinance. This Court has held that it is the criminal enforceability of a law, rendering it *presently* coercive, which may be the factor creating its unconstitutionality. *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152-154 (1967).

Respondents state that the Church's reliance on such cases as *Colautti v. Franklin*, 439 U.S. 379 (1979) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) is "misplaced" because "none of those cases involved, as in the instant case, a statute which allowed individuals to seek an exemption from the statute's application as does the Landmarks Law." (Br. 29). The respondents' misapprehension of the Church's case persists: it is of the essence of the Landmarks Law that it allows no exemptions and that even its "relief" processes allow no

---

6. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S.____, 105 S.Ct. 3108 (1985).

other criteria for "relief" than aesthetic and other cultural factors. But a church is "not just a piece of real estate". Rather, it is "the outward symbol of a religious faith". *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 121 (1952) (Frankfurter, J., concurring).

CONCLUSION

For the foregoing reasons, responsive to the arguments contained in the Brief In Opposition, it would appear that summary reversal would be in order, but that, in any event, the petition should be granted.

Respectfully submitted,

Of Counsel:

BALL & SKELLY
511 North Second Street
P.O. Box 1108
Harrisburg, PA 17108
(717) 232-8731

WILLIAM BENTLEY BALL
Counsel of Record

PHILIP J. MURREN
SANDRA E. WISE

ELLIS, STRINGFELLOW, PATTON & LEIBOVITZ
51 East 42nd Street
New York, NY 10017
(212) 867-0180

FRANK PATTON, JR.
WILLIAM LEIBOVITZ
Counsel for Petitioner

November 14, 1986